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No. 07-1387

FILED
JUL 7 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

STROMAN REALTY, INC.,

Petitioner,

v.

SAM WERCINSKI, Commissioner of the Department of Real Estate for the State of Arizona,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether differences in analyses concerning the propriety of exercising specific personal jurisdiction over nonresident public officials in § 1983 cases that are based on factual distinctions rather than on disparate legal positions concerning the proper standard to apply to similar facts in such cases create any conflict among the circuit courts that this Court needs to address.

2. Whether this Court should grant the petition for writ of certiorari to address which due-process analysis applies in federal-question cases once the forum State's long-arm criteria are met when that issue was neither raised nor addressed below.

3. Whether this Court should grant the petition for writ of certiorari to address whether the Due Process Clause applies in the first instance against public officials in their official capacities when that issue was neither raised nor addressed below.

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STATEMENT OF THE CASE

Arizona law requires the Commissioner of the Arizona Department of Real Estate to investigate written complaints concerning "the actions of any natural person or entity engaged in the business or acting in the capacity of a [real estate] broker, salesperson, or developer." Arizona Revised Statutes § 32-2108(A). The Commissioner received numerous complaints from Arizona residents concerning Stroman Realty, Inc. (Stroman), a Texas-based company. Appendix to Stroman's Petition for Writ of Certiorari (Pet. App.) 25a, 34a. Following an investigation, Commissioner Elaine Richardson[1] issued a Cease and Desist Order and Notice of Right to Request a Hearing (the Order) on January 13, 2000, finding that Stroman and its agents, none of whom had an Arizona real estate license, were engaging in timeshare resale activities for which an Arizona real estate license was required. Pet. App. 67a-73a. The Commissioner found that "the public health, safety, or welfare imperatively require[d] immediate action" and ordered Stroman and its agents to stop such activities until they complied with Arizona's real estate licensing laws and regulations. *Id.* 71a-72a.

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[1] Sam Wercinski replaced Elaine Richardson as Commissioner on January 11, 2007, and was automatically substituted as the Defendant-Appellee in this case. *Id.* 3a n.1.

The Order informed Stroman and its agents that (1) they had a right to invoke the statutory administrative appeal and judicial review process and (2) that the Order would be given preclusive effect if they did not timely exercise those rights. *Id.* 72a-73a. Stroman did not respond, and the Order became a final, non-appealable administrative decision pursuant to Arizona law. *Id.* 5a.

Stroman continued to broker transactions that involved Arizona residents and timeshares despite the Order, and the Commissioner contacted it by mail in early 2005, asking it to respond to allegations that it was violating Arizona law and the Order. *Id.* 64a-66a. In response, Stroman filed a 42 U.S.C. § 1983 action against the Commissioner in her official capacity in the Southern District of Texas. *Id.* 34a-63a. The complaint sought (1) a declaration that the Commissioner's attempted enforcement of Arizona's real estate statutes and regulations against Stroman violated the Commerce Clause, *id.* 5a, 59a-61a, and (2) an injunction prohibiting the Commissioner from enforcing Arizona's statutes and regulations against Stroman, *id.* 62a.

The Commissioner filed a motion to dismiss arguing that (1) res judicata principles barred Stroman's complaint; (2) the federal district court in Texas lacked personal jurisdiction over the Commissioner; and (3) venue was proper in Arizona, not Texas. *Id.* 26a. The Commissioner also filed a summary judgment motion arguing that the statute of limitations barred Stroman's action. *Id.* 5a. The district court granted the motion to dismiss on res

judicata grounds and also concluded that it should abstain from hearing the case based on *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Pet. App. 27a-31a.

Stroman appealed to the United States Court of Appeals for the Fifth Circuit. *Id.* 1a. The Fifth Circuit affirmed on the ground that the Southern District of Texas lacked personal jurisdiction over the Commissioner. *Id.* 1a-23a. It subsequently denied Stroman's Petition for Rehearing en Banc. *Id.* 32a-33a.

REASONS TO DENY THE PETITION

I. The Differing Analyses Reflected in the Cases that Stroman Cites Are Based on Factual Differences Among the Cases, Not on Any Conflict Among the Circuit Courts Concerning the Proper Legal Standard to Apply to Similar Facts in Such Cases.

A. The Cases that Stroman Cites Do Not Support Its Contention that Only the *Calder* "Effects" Test Should Govern the First Step of the Jurisdictional Analysis in § 1983 Actions Against Public Officials Sued in Their Official Capacities or Its Contention that There Is a Conflict Among the Circuits Concerning This Issue.

Stroman contends that the Fifth Circuit's ruling that it lacks personal jurisdiction over the Commissioner conflicts with the Ninth Circuit's ruling in

Ziegler v. Indian River County, 64 F.3d 470 (9th Cir. 1995). Pet. at 11-12. Stroman is wrong because *Ziegler* and the other cases on which Stroman relies differ factually from the present case. It is those differences, not conflicting legal rulings concerning the proper standard to apply to similar facts in § 1983 actions against public officials in their official capacities, that explain the differences in their analyses.

The Due Process Clause requires that individuals receive fair warning that certain actions may subject them to suit in a foreign forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). This requirement is satisfied if a defendant has "certain minimum contacts" with the forum so that requiring him to defend a suit in the forum "does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Where a cause of action is based upon or related to a defendant's activities in the forum State, a court may exercise specific jurisdiction over the defendant if the "'relationship among the defendant, the forum, and the litigation'" is such that requiring the defendant to defend a suit in the forum is reasonable under due-process standards. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 & n.8 (1984) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

This Court has noted that "[l]ike any standard that requires a determination of 'reasonableness,'" the minimum-contacts test does not lend itself to "mechanical application; rather, the facts of each case

must be weighed to determine whether the requisite 'affiliating circumstances' are present." *Kulko v. Cal. Superior Court*, 436 U.S. 84, 92 (1978) (quoting *Hanson v. Denckla*, 357 U.S. 235, 246 (1958)). This Court has also instructed that courts must consider "the 'quality and nature' of [a] defendant's activity" in determining whether the exercise of personal jurisdiction over him comports with due-process requirements. *Id.* at 92 (quoting *Int'l Shoe*, 326 U.S. at 319).

In the present case, the Fifth Circuit applied the correct test to determine whether the exercise of specific personal jurisdiction over the Commissioner was proper: (1) whether she "purposefully directed [her] activities toward the forum state [Texas] or purposely availed [herself] of the privileges of conducting activities there"; (2) whether Stroman's cause of action arose out of or resulted from the Commissioner's forum-related contacts; and (3) whether the exercise of personal jurisdiction over the Commissioner would be fair and reasonable. Pet. App. 10a-11a.

In addressing the first step of the specific personal-jurisdiction inquiry, the Fifth Circuit stated that under the "effects" test of *Calder v. Jones*, 465 U.S. 783 (1984), "'the effects of an alleged intentional tort are to be assessed as part of the analysis of the defendant's relevant contacts with the forum.'" Pet. App. 14a (quoting *Allred v. Moore & Peterson*, 117

F.3d 278, 286 (5th Cir. 1997)).[2] It further explained that under the test, "an act done outside a state that has consequences or effects within the forum state can suffice as a basis for personal jurisdiction if the effects are seriously harmful and were intended or highly likely to follow from the nonresident defendant's conduct." *Id.*

Calder's language supports the Fifth Circuit's interpretation. In *Calder*, this Court noted that the California appellate court had concluded that California courts could properly exercise personal jurisdiction over the Florida defendants because the defendants "intended to, and did, cause tortious injury" to a California resident with the allegedly libelous article about her that they had written and edited in Florida. *Calder*, 465 U.S. at 787. This Court approved of and adopted this approach. *Id.* n.6. In doing so, it observed that the defendants had "not [been] charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California." *Id.* at 789. The Court also observed that the defendants

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[2] As Stroman acknowledges, *Calder's* "effects" test is used in tort cases to determine whether a defendant's actions fall within this step, whereas in commercial cases, courts examine whether the defendant has engaged in "some act by which [he] purposefully avail[ed] [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Hanson*, 357 U.S. at 253. *See* Pet. at 16.

knew that the article "would have a potentially devastating impact" on the plaintiff. *Id.*

The Fifth Circuit determined that the Commissioner did not have the requisite intent to warrant Texas's exercise of personal jurisdiction over her based on the "effects" test. Pet. App. 14a-15a. It concluded that "[b]y seeking to regulate Stroman's activities involving Arizona residents or property, the Commissioner [was] not 'expressly aim[ing]' her actions at Texas," but was instead intending "to uphold and enforce" Arizona law. Pet. App. 14a-15a (quoting *Calder*, 465 U.S. at 789). It stated that in doing so, the Commissioner was "essentially asserting nationwide authority over any real estate transactions involving Arizona residents or property" rather than "purposefully directing" any conduct at Texas. Pet. App. 14a.

Although Stroman states that any assertion that a public official is authorized to exercise his authority goes to the merits of the case, not to the jurisdictional analysis, Pet. at 23 n.10, the fact that a public official's actions involve enforcing presumably valid state laws is relevant to determining whether the official acted with the type of intent that the "effects" test requires. Without more, such actions simply do not establish that an official intended to inflict serious harm or injury or that serious harm or injury was likely to follow from the official's actions. *See Stroman Realty, Inc. v. Martinez*, 505 F.3d 658, 663 (7th Cir. 2007) (noting in affirming the district court's decision to abstain from ruling on Stroman's case while a state

administrative proceeding concerning Stroman was pending that "[a]t best, Stroman has argued that the statutes the Department seeks to enforce have the type of *incidental* effects that a valid licensing scheme has on out-of-state companies").

Ziegler and the cases that Stroman cites for the proposition that *Calder* should govern all § 1983 actions against public officials, Pet. at 14-18, are factually distinguishable from the present case because the officials in those cases were not simply enforcing state laws and the plaintiffs in them were not simply seeking to enjoin the enforcement of those laws. The officials instead engaged in conduct that was intended to or was at least highly likely to cause harm or injury in another forum, and the plaintiffs were seeking to recover damages for the harm or injury that the officials had caused. *See Ziegler*, 64 F.3d at 475 (nonresident officials had the forum resident arrested for grand theft "despite their apparent knowledge that no crime had been committed"); *Lee v. City of Los Angeles*, 250 F.3d 668, 677-78 (9th Cir. 2001) (nonresident police officers traveled to the forum State and took a seriously mentally ill man back to their State without comparing his fingerprints or personal characteristics to those of the man wanted in their State; the man spent two years in prison where he was assaulted by other inmates until the mistake was revealed by the arrest of the real fugitive); *Taylor v. Phelan*, 912 F.2d 429, 430-31 (10th Cir. 1990) (nonresident police officers assured forum residents that they were investigating the sexual

assault of their daughter and that the residents were not in any danger from the assailant; after a nonresident officer who did not have any present ability to arrest the assailant informed him by telephone that a warrant had issued for his arrest, the assailant broke into the forum residents' home, seriously injured three family members, and killed a fourth); *Overby v. Johnson*, 418 F. Supp. 471, 471 (E.D. Mich. 1976) (former medical directors of the Michigan prison in which the plaintiff was incarcerated who no longer lived in Michigan had allegedly deprived the plaintiff of adequate medical care by failing to provide him with the low-cholesterol diet that his diseased arteries required); *Maney v. Ratcliff*, 399 F. Supp. 760, 764-66, 773 (E.D. Wis. 1975) (Louisiana officials placed an entry in the National Crime Information Center database stating that the forum resident was wanted in Louisiana but never provided extradition papers following the forum resident's three arrests based on that entry or removed the entry from the database).[3]

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[3] Stroman also cites *Stroman Realty, Inc. v. Antt*, 20 F. Supp. 2d 1050 (S.D. Tex. 1998), Pet. at 14 n.3, 25, in which Stroman had sued California and Florida officials based on the same claims that it made against the Commissioner in this case. The Fifth Circuit recently reversed that decision in light of its decision in this case and found that the federal district court in Texas lacked personal jurisdiction over the California and Florida officials. No. 05-20803, 2008 WL 2043193 (5th Cir. May 14, 2008).

Stroman also cites *Dial-Up Services, Inc. v. Oregon*, No. 07-00423-PHX-EHC, 2007 WL 4200756 (D. Ariz. Nov. 27, 2007). Pet. 14 n.4. Although *Dial-Up Services* cited *Ziegler* for the

(Continued on following page)

Thus, the facts of these cases could establish that the forum State's exercise of personal jurisdiction over nonresident public officials comported with due-process requirements under the *Calder* "effects" test, whereas the facts of the present case could not.

Stroman also argues that the Fifth Circuit erred in declining to follow *Great Western United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on venue grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979). Pet. at 12-15. In *Kidwell*, the Fifth Circuit held that a federal district court in Texas could properly exercise personal jurisdiction over the Idaho officials who had enforced Idaho's takeover statutes against a Texas company and had delayed the effectiveness of its tender offer for an Idaho company's stock in the process. 577 F.2d at 1270. The court based its determination in part on the effects that the officials' actions had had on the company. It noted that by enforcing Idaho law, the officials had caused the company to make efforts to comply with that law and had prevented it from proceeding with its plans. *Id.* at 1267. It believed that these types of effects "on important business plans" were "more than sufficient to satisfy the minimum contacts requirement." *Id.* It likened the officials' actions to

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proposition that § 1983 claims for deprivation of constitutional rights were more like tort claims than like contract claims, 2007 WL 4200756 at *4 n.2, it was not a § 1983 case. The plaintiff instead sued under the federal All Writs, Anti-Injunction, and Declaratory Judgment Acts. *See* 2007 WL 4200756 at **2, 4.

the tort of intentional interference with a commercial relationship, *id.* at 1268, and commented that "the impact of [the officials'] regulation was felt in Texas, as they intended it to be," *id.* at 1269.

The Fifth Circuit declined to follow this aspect of *Kidwell* because it believed that *Calder* had "significantly cut back" "effects"-based jurisdiction. Pet. App. 21a. The Fifth Circuit was correct because as previously discussed, public officials enforcing presumably valid state laws do not, without more, manifest the type of intent to inflict serious injury or harm in another forum that is an essential component of the "effects" test under *Calder*.

Another case that Stroman cites, *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158 (2d Cir. 2005), illustrates that the facts of all § 1983 official-capacity actions[4] do not fit the tort-based model to which the *Calder* "effects" test would apply, but that courts may nevertheless find that a forum State's exercise of personal jurisdiction over the defendants in such actions comports with due-process principles based on other factors. In *Grand River*, several tobacco companies filed a § 1983 action in federal district court in New York against thirty-one current and former state attorneys general in their

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[4] Although the decision does not state that the plaintiffs sued under § 1983, that information appears in the underlying unreported decision, which the published decision cites. *See* 425 F.3d at 164.

official capacities challenging state statutes enacted pursuant to a master settlement agreement that had settled litigation between numerous tobacco companies and forty-six States. *Id.* at 162. In the litigation, the States were attempting to recover the costs of treating smoking-related illnesses. *Id.* The agreement had resulted from negotiations that representatives of forty-six States and of the tobacco companies had conducted in New York City over a five-month period. *Id.*

In determining that the exercise of personal jurisdiction over the defendants in New York was proper, the Second Circuit found that by engaging in extensive negotiations there, agreeing to submit to the jurisdiction of its courts to resolve any dispute arising under the agreement, and executing the settlement agreement there, the defendants had "transacted business" within the meaning of the state long-arm statute and had purposefully availed themselves of the privilege of conducting activities in New York. *Id.* at 166-67. It also noted that settling a civil lawsuit seeking compensation for healthcare costs was a business transaction. *Id.* at 167. It concluded that there was no reason why it should not view the agreement's negotiation and execution as it would those of an ordinary commercial contract. *Id.* It also found that there was a sufficient nexus between the New York negotiations and the plaintiffs' cause of action because the suit challenged not only the statutes enacted pursuant to the agreement but the agreement itself. *Id.* Finally, it found that the defendants could

reasonably have anticipated being haled into court in New York because the negotiations had been conducted there. *Id.*

The defendant public officials in *Grand River* could not have been found to be subject to personal jurisdiction in New York under the "effects" test because there was no evidence that they had engaged in conduct that was intended to or was at least highly likely to cause serious harm or injury in New York. Yet the court found that they were subject to personal jurisdiction there based on other considerations to which the facts of the case gave rise.

Given this Court's admonition that courts must determine the propriety of exercising personal jurisdiction based on the facts of each case, *Kulko*, 436 U.S. at 92, there is no reason why courts should be limited to applying the "effects" test in § 1983 actions. *See, e.g., Kidwell*, 577 F.2d at 1267, 1269 n.28 (noting that "the existence of personal jurisdiction turns upon the facts of each case" and that whether a defendant has, for example, benefited from the forum State's laws is simply a factor for the court to consider and "to discount if the benefit is attenuated or speculative"). More importantly, the § 1983 cases that Stroman has cited establish that the courts have relied on differing factors in those cases to determine whether personal jurisdiction over the nonresident public officials was proper based on differences among the facts of the cases themselves and not based on any legal dispute as to the proper standard to apply in such cases. Distinctions that are the result of such

factual differences do not establish any conflict among the circuit courts that requires this Court's attention.

B. Stroman's Assertion that the Fifth Circuit Added an Unwarranted Economic Criterion to the Test that It Applied Is Based upon Stroman's Erroneous Assumption that Only the *Calder* "Effects" Test Should Govern the First Step of the Personal-Jurisdiction Analysis in § 1983 Actions.

Stroman asserts that the Fifth Circuit added an unwarranted economic criterion to the test that it applied. Pet. at 11, 18-21. This assertion makes sense only if one assumes as Stroman does that the *Calder* "effects" test establishes the only criteria that courts can apply to determine whether the first step of the personal-jurisdiction inquiry is met in § 1983 actions against nonresident public officials. This is not the case. Courts may also consider whether the defendant has engaged in "some act by which [he] purposefully avail[ed] [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Hanson*, 357 U.S. at 253. *See* Pet. at 16.

Contrary to Stroman's assertion, Pet. at 18 and 21, the Fifth Circuit did not state in the present case that where the *Calder* "effects" test is met, plaintiffs must also demonstrate that the public official's conduct satisfies the *Hanson* test. Nor did it state, as

Stroman asserts, Pet. at 10, that the "effects" test did not apply in § 1983 actions. It instead applied the "effects" test and the *Hanson* test separately and said that the actions that the Commissioner had taken did not establish that Texas's exercise of jurisdiction over her was proper under either test. Pet. App. 11a-12a, 14a-15a.

The Fifth Circuit explained that courts normally exercise specific jurisdiction "over nonresident defendants that are engaged in commercial, profit-oriented enterprise[s]." Pet. App. 12a. It further explained that in *Kulko*, this Court stated that a defendant's conduct could not fairly be analogized to the conduct of the defendants in the commercial activity cases if the defendant had not engaged in any "'commercial transactions in interstate commerce'" from which he "'sought a commercial benefit.'" Pet. App. 12a (quoting *Kulko*, 436 U.S. at 97). The Fifth Circuit observed that the Commissioner's actions in the present case should not be analogized to those of the defendants in the commercial cases; although she had "reached out to assert her authority over Stroman's Arizona-related business activities" by issuing a cease-and-desist letter and corresponding with Stroman's attorneys, she had not by those actions "purposefully availed herself of the benefits of Texas law like someone actually doing business in Texas" would have. Pet. App. 11a (internal quotation marks omitted). The court further noted that the Commissioner had not "engaged in commercial transactions to obtain a commercial benefit" either. Pet. App. 13a.

Having concluded that the actions the Commissioner had taken did not establish that Texas's exercise of personal jurisdiction over her was proper under the test normally used in commercial cases, the court discussed its reasons for finding that her actions did not establish that the exercise of jurisdiction was proper under the "effects" test that is used in tort cases either. Pet. App. 13a-15a. It did not state that the "effects" test included any inquiry as to whether a defendant was doing business or obtaining an economic benefit. Pet. App. 13a-15a. Thus, Stroman's assertion that the court added an unwarranted economic criterion to the test that it applied is incorrect.

Stroman contends that the Sixth Circuit also added an unwarranted economic criterion to the test that it applied in *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 954 F.2d 1174 (6th Cir. 1992). Pet. at 18-19, 21. That case concerned disposal sites for low-level radioactive waste. Only three States had such sites. *Id.* at 1175. Congress enacted legislation that required those three States to continue to accept such waste from the other States for a fixed period and required the other States to begin to assume the burden of disposing of their own waste. *Id.* When the three States that had the sites perceived that Michigan was not complying with the federal legislation, they wrote letters to and telephoned Michigan public officials, legislators, and radioactive waste generators threatening to refuse to accept any waste from Michigan if it did not enact the

legislation necessary to comply with the federal requirements. *Id.* at 1176. After they eventually did refuse to accept any waste from Michigan, a Michigan association whose members generated radioactive waste sued the officials who administered the sites in each of the three States in federal district court in Michigan. *Id.* at 1175.

The Sixth Circuit held that there was no evidence that the defendants had purposefully availed themselves of the benefit of Michigan law because their compliance with federal law should not be construed as purposeful action. *Id.* at 1177. It further held that the defendants' telephone calls and letters were not sufficient to establish purposeful availment or to constitute "evidence of threshold activity in a forum state." *Id.* It also noted that the defendants had never solicited any business in Michigan or induced it to use the disposal sites in their States and that their States had not undertaken any economic activity in Michigan related to the sites. *Id.* It observed that it was actually the association that had availed itself of the privileges of doing business in the defendants' States. *Id.* It did not discuss the *Calder* "effects" test in the first step of its personal-jurisdiction analysis. *See id.* at 1177.

The Sixth Circuit could properly consider whether the nonresident officials had engaged in any economic activity in the forum State or gained any economic benefit from their forum-related contacts. In contending that the Fifth Circuit's decision in the present case and the Sixth Circuit's decision in

Griepentrog added an unwarranted economic criterion to their analyses, Stroman fails to recognize that these are the only two § 1983 cases other than *Kidwell* that it cites in which the nonresident public officials were simply enforcing state or federal law without more. Their analyses are similar because their facts are similar. Given their facts, it was appropriate to discuss all of the factors that might have subjected the officials to jurisdiction but that were not present, including economic ones. Similarly, that the cases in which the "effects" test would support a finding that the exercise of personal jurisdiction over a nonresident public official in a forum State might not discuss the absence of any economic benefit from the officials' activities in the forum State is a reflection of differing fact patterns, not of any conflict or confusion as Stroman claims, *see* Pet. at 21.

Although Stroman asserts that the Fifth Circuit "created a jurisdictional standard unique to State actors in Section 1983 cases," Pet. at 12, it has not cited any case other than *Kidwell* in which a court has applied an "effects" type of test in a § 1983 action to find that the exercise of personal jurisdiction over a nonresident public official who was enforcing state law, without more, was proper. The *Kidwell* court, moreover, did not limit its inquiry to an "effects" type of analysis. It also applied the *Hanson* test, just as the Fifth Circuit did in the present case and the Sixth Circuit did in *Griepentrog*. *Kidwell*, 577 F.2d at 1268-69. It also stated that the "business" of the nonresident public official's State "[was] to regulate" and that

the State "was conducting that business" in the forum State. *Id.* at 1268. It therefore analogized the State's conduct to that of an insurance company sending an insurance contract and premium notices into the forum State. *Id.* In evaluating the personal-jurisdiction issue, it recognized that such evaluations must be based on the facts of each individual case and that courts could put greater or lesser weight on the factors to be considered depending on those facts. *Id.* at 1269 n.28. Although the ultimate conclusion in *Kidwell* differed from that in the present case and in *Griepentrog*, the basic framework of its inquiry was the same. The Fifth Circuit explained its refusal to follow *Kidwell* by correctly noting that subsequent decisions of this Court had "overtaken" each component of *Kidwell* and that those decisions were controlling. Pet. App. at 21a-22a.

Stroman contends that "adding additional criteria before jurisdiction over state officials can be found" also conflicts with cases from the Second Circuit such as *Grand River*. Pet. at 19. It maintains that in finding that the exercise of personal jurisdiction in New York over the state attorneys general who had negotiated the master settlement there was proper, the court did not impose any requirement that the state officials financially benefit from the transaction. *Id.* at 20. But this does not demonstrate a conflict – whether it is appropriate to discuss the presence or absence of certain factors depends on the facts of the particular case. Moreover, the *Grand River* court recognized that there was an economic

aspect (if not a commercial one) to the settlement. It stated that "[s]ettling a civil suit seeking compensation for, *inter alia*, healthcare costs is a business transaction." 425 F.3d at 167. It therefore saw no need to view the settlement "any differently than an ordinary commercial contract." *Id.*

Stroman also cites *Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998), for the proposition that adding economic criteria conflicts with Second Circuit cases. Pet. at 20. Again, whether discussing the presence or absence of certain factors is appropriate depends on the facts of the particular case. In *Kronisch*, the plaintiff had sued the United States and two Central Intelligence Agency (CIA) officials in their official and individual capacities alleging that while in Paris, he had been a victim of a CIA program that administered lysergic acid diethylamide (LSD) to unsuspecting persons in the United States and abroad. *Id.* at 116. The court found that during several trips to New York, the defendant at issue had discussed becoming involved with the program with persons who were administering it, that persons who were administering the program in New York regularly reported the results of their research to him, and that he might have taken LSD himself in New York while one of the people administering the program was present. *Id.* at 130-31. The court concluded that these contacts, which laid the groundwork for the LSD program that the plaintiff claimed to have been a victim of while in Paris, established a prima facie case that the defendant had purposefully

availed himself of the privilege of conducting activities in New York and that the plaintiff's claim arose out of those activities so that the exercise of personal jurisdiction over the defendant in New York was proper. *Id.* at 131. That the court did not specifically address whether the defendant had benefited financially from his contacts with New York does not establish any conflict with cases that do address the presence or absence of a financial benefit from a defendant's activities because that is appropriate under the facts presented.

Thus, Stroman has not established that the Fifth Circuit's analysis of economic criteria in this case conflicts with the decisions of other circuits.

C. Stroman's Assertion that Courts Should Consider Only the Factors that the Forum State's Long-Arm Statute Identifies in Determining Whether the Exercise of Personal Jurisdiction Is Proper Is Also Based Upon Stroman's Erroneous Assumption that Because § 1983 Actions Are Treated as Torts for Some Purposes, They Must Invariably Be Treated as Torts for Purposes of the Personal-Jurisdiction Inquiry.

Stroman asserts that in determining whether personal jurisdiction over nonresident public officials in § 1983 cases is proper, courts should consider only those factors that the state long-arm statute identifies. Pet. at 19. This is premised upon Stroman's

erroneous assumption that because § 1983 actions are treated as torts for some purposes, they must invariably be treated as torts for purposes of the personal-jurisdiction inquiry. As previously discussed, cases such as *Grand River* belie that theory. Moreover, while the two major steps of the personal-jurisdiction inquiry may conflate into a single step if the state long-arm statute authorizes service to the full extent that Fourteenth Amendment due-process considerations permit, Stroman has not cited any authority for the proposition that the scope of the due-process inquiry is somehow limited by scope of the long-arm statute. The two requirements serve different purposes.

A court must have jurisdiction over a defendant's person to adjudicate a claim against or to impose an obligation upon a defendant personally. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969). This requirement stems from the Due Process Clause, which protects an individual's liberty by imposing this restriction on judicial power. *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). A court cannot exercise personal jurisdiction over a defendant until the procedural requirement of properly serving the defendant with summons has been met. *Id.* Federal courts are courts of limited jurisdiction. *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982). Unless the defendant consents to service, a federal court must therefore have authorization to serve him. *See Omni*, 484 U.S. at 104. Rule 4 of the

Federal Rules of Civil Procedure normally governs service of process in the federal courts. *Id.* Where the federal act in question does not authorize service of process, Rule 4(e) directs district courts to the long-arm statute of the State in which the district court sits. *Id.* at 108. Rule 4(e)(1) states that unless federal law provides otherwise, individuals may be served in any federal judicial district in accordance with the law of the State in which the district court is located.

Once a court determines that the state long-arm statute authorizes service under the particular circumstances in question, it must then determine whether the exercise of personal jurisdiction comports with due-process requirements. *Grand River*, 425 F.3d at 165. If the state long-arm statute authorizes service to the full extent that due process permits, then the two inquiries conflate into a single inquiry. *Griepentrog*, 954 F.2d at 1176. But nothing that Stroman has cited establishes that the factors that the state long-arm statute lists somehow limit the factors that a court can consider in deciding whether a defendant has the requisite minimum contacts with the forum to ensure that the exercise of personal jurisdiction over him "does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken*, 311 U.S. at 463).

Stroman also states that in *Grand River*, the court relied solely on the State's long-arm statute to determine whether New York could properly exercise personal jurisdiction over the nonresident public

officials. Pet. at 11, 20. It contends that this supports its position that there is confusion in the circuit courts concerning the standard to apply in determining whether the exercise of personal jurisdiction over nonresident public officials in § 1983 actions is proper. *Id.* at 11, 20. However, the Second Circuit expressly acknowledged in *Grand River* that it had to determine both whether the long-arm statute established jurisdiction over the defendants *and* whether the exercise of jurisdiction comported with federal due-process requirements. 425 F.3d at 165.

Although New York's long-arm statute does not extend to the limits of due process, *see Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 244 (2d Cir. 2007), some aspects of the Second Circuit's inquiry under the long-arm statute tracked the steps of the due-process inquiry – i.e., whether the defendants had purposefully availed themselves of the privilege of conducting activities in New York, thereby invoking the benefits and protections of New York law, and whether a substantial nexus existed between the defendant's forum-related activities and the plaintiffs' cause of action (i.e., whether the cause of action arose out of the negotiations). *Grand River*, 425 F.3d at 166-67. These are the first two steps of the three-step due-process analysis that the Fifth Circuit applied in this case. Pet. App. 10a-11a. There was no reason for the *Grand River* court to repeat these steps in its due-process analysis when it had already discussed them in conjunction with the long-arm statute. It did address the third step – whether the exercise of

personal jurisdiction was fair and reasonable, *see* Pet. App. 11a – by noting that because the negotiations in question had been carried out in New York, it was foreseeable that the officials would be subject to suit there. 425 F.3d 167. It clearly was addressing the due-process inquiry at this point because it cited the portions of this Court's *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980), and *Burger King*, 471 U.S. at 474, decisions in which the Court stated that the crucial foreseeability inquiry in the due-process analysis is whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." 425 F.3d at 167. Thus, *Grand River* does not establish that there is any confusion among the circuit courts in this respect either.

D. The Fifth Circuit Correctly Refused to Find that Texas's Exercise of Personal Jurisdiction over the Commissioner Was Proper Under the "Effects" Test, Based in Part on the Concern that Such a Ruling Would Subject Public Officials Who Simply Ordered a Nonresident Defendant to Comply with State Law Before Doing Business in the State to Suit in a Multitude of Forums.

Stroman contends, Pet. at 21-22, that the Fifth Circuit erred in refusing to find that Texas's exercise of personal jurisdiction over the Commissioner was proper, based in part on its concern that such a ruling

would potentially subject any state official enforcing his State's laws to suit in any State where the validity of his State's laws was questioned, Pet. App. 16a-19a. The Fifth Circuit correctly perceived that under Stroman's theory, a nonresident could assert that personal jurisdiction existed in his home State over a public official who had, without more, ordered him to comply with state law as a prerequisite to conducting business in the official's State. Assuming that the requirements of the state long-arm statute were satisfied, the plaintiff would only have to allege in a § 1983 action that the law in question was unconstitutional and that its enforcement had harmed him in the forum State. The Fifth Circuit properly noted that the fact that the plaintiff alleged injury in the forum State, even from an intentional tort, was not sufficient to establish that the exercise of personal jurisdiction was proper. Pet. App. 14a. If that were enough, plaintiffs would always, as the court feared, be able to hale nonresident public officials into court in their home States because they would always feel the effects of the challenged legislation there. The Fifth Circuit's refusal to authorize the exercise of personal jurisdiction on this basis comports with this Court's statement that even foreseeable injury is not "'a sufficient benchmark' for exercising personal jurisdiction" and that the critical inquiry is whether "'the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" *Burger King*, 471 U.S. at 474 (quoting *World-Wide Volkswagen*, 444 U.S. at 295, 297).

The Fifth Circuit correctly determined that by simply ordering an out-of-state resident to comply with state-law prerequisites for doing business in his State, a public official does not manifest the intent to cause injury or harm in the forum State or the purposeful direction of tortious conduct at the forum State that the *Calder* test requires. Pet. App. 14a-15a. It also correctly determined that such conduct does not establish that the nonresident official has purposefully availed himself of the privilege of conducting activities in the forum State as the *Hanson* test requires. Pet. App. 11a-12a. It therefore concluded that the Commissioner's mailing of the cease-and-desist order and the correspondence with Stroman's attorneys did not constitute sufficient minimum contacts with Texas to enable her to reasonably foresee that she could be haled into court there. Pet. App. 12a.

In declining to establish the broad principle that would permit a public official who had simply ordered a nonresident to comply with his State's law as a prerequisite to doing business in his State to be subject to suit in any forum in which a plaintiff chose to challenge that law, the Fifth Circuit recognized that a State that has to defend its laws in a another forum "loses the benefit of having the law examined by local or state federal courts – courts that have special expertise interpreting its laws." Pet. App. 17a. Stroman's assertion that this concern is unwarranted because one federal court is as capable as another of resolving federal-law issues, Pet. at 24-25, overlooks

the fact that the federal issue here involves the constitutionality of Arizona's laws. As this Court has recognized, "federal judges sitting in [a State] are better qualified to construe [that State's] law, and to assess the character of [that State's] probable enforcement of that law, than are judges sitting elsewhere." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 186 (1979).

The Fifth Circuit also noted that while Texas has an interest in providing Stroman with a convenient forum in which to redress its grievances, a rule that would permit public officials to be sued in any forum in which a plaintiff chose to file a § 1983 action challenging the enforcement of a state law "could lead to a multiplicity of inconsistent verdicts on a significant constitutional issue" that only this Court would be able to resolve. Pet. App. 18a. The Fifth Circuit further noted that if the constitutionality of the challenged laws in this case was resolved in an Arizona forum, "judicial efficiency and uniformity [would] prevail." *Id.* This result would also preserve the certainty that final decisions by the federal courts sitting in a State normally provide a State.

It is also true that while having to defend one attack on the constitutionality of a state law in another forum might not impose a substantial practical or economic burden on a State, having to defend a multiplicity of attacks on state law in other forums certainly could impose such a burden. This is particularly true if the susceptibility to such attacks could be caused simply by ordering nonresidents to comply

with state law before doing business in the State. Having to choose between enforcing state law and shouldering the burden of defending a multitude of lawsuits in other forums would put States in an untenable position. This position would be particularly unfair because as the Fifth Circuit observed in this case, Pet. App. 15a-16a, and the Sixth Circuit observed in *Griepentrog*, 954 F.2d at 1177, the plaintiffs in such cases have usually decided unilaterally to avail themselves of the privilege of doing business in the State and the State is "simply attempting to uniformly apply its laws," Pet. App. 16a.

The Fifth Circuit also noted that Arizona has "a strong interest in not having an out-of-state court evaluate the validity of its laws." Pet. App. 18a. This is perhaps particularly true where the laws at issue protect the State's consumers or regulate transactions involving property within a State's borders as Arizona's real estate licensing laws do here. As the Fifth Circuit observed, Texas has comparatively little interest in resolving disputes over the validity of Arizona's statutes. Pet. App. 17a.

The Fifth Circuit grounded its decision in part on federalism concerns, citing *World-Wide Volkswagen*, 444 U.S. at 292-94. Pet. App. 17a-19a. In *Insurance Corp. of Ireland,* 456 U.S. at 703 n.10, this Court stated that the restrictions on the courts' power that it discussed in *World-Wide Volkswagen* "must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause" (which is "the only source of the personal jurisdiction requirement" and which does

not mention federalism concerns) rather than as independent limitations on the courts' sovereign powers stemming from federalism concerns. Commentators have nevertheless observed that despite this statement "it does not seem plausible to read territoriality and sovereignty concerns entirely out of minimum contacts analysis," given that "the states to which [the Fourteenth] Amendment applies are coequal sovereigns within a federalist system, and the Amendment must be read with this in mind." 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1067.1 (3d ed. 2002).

Stroman cites *St. Croix Waterway Ass'n v. Meyer*, 942 F. Supp. 435 (D. Minn. 1996), and *Dairy Mart Convenience Stores, Inc. v. Nickel*, 411 F.3d 367 (2d Cir. 2005), for the proposition that when a State attempts to regulate activity outside its borders and within the boundaries of another State, it is reasonable for the latter State to exercise jurisdiction over the regulating State. Pet. at 22-23. These cases are distinguishable from the present one.

The *St. Croix Waterway Ass'n* case arose out of the Wild and Scenic Rivers Act that Congress enacted to protect certain waterways, in part through state and federal cooperative agreements and interstate compacts. 942 F. Supp. at 437. Pursuant to the Act, Minnesota and Wisconsin enacted legislation that authorized having the Lower St. Croix River included in the Federal Wild and Scenic Rivers System and directed that their Natural Resource Commissioners

join the Secretary of the Interior in drafting a comprehensive master plan and that they promulgate rules for the river's regulation and administration. *Id.* at 438. An association of persons who operated motorboats on the river sued the Wisconsin and Minnesota officials responsible for enforcing the regulations at issue in federal district court in Minnesota seeking a declaratory judgment that the regulations were unconstitutionally vague. *Id.* at 437-39. The Wisconsin official challenged the court's exercise of personal jurisdiction over him. *Id.* at 440.

The court noted that the two States had consciously decided to administer their respective sides of the river jointly pursuant to federal law, that they had adopted identical regulations applicable to both States' waters, and that each State could enforce the regulations without regard to the State in which the alleged violation occurred. *Id.* at 441. It concluded that the Wisconsin official's contacts with Minnesota were "qualitatively and quantitatively substantial, pervasive and purposeful." *Id.* It noted that it was not the plaintiff's conduct that had caused the official's contact with Minnesota, but the official's own conduct, given that Wisconsin's regulations had been "purposefully directed at Minnesota waters" in the river. *Id.*

The Wisconsin official in that case had many more numerous and substantial contacts with the forum State than a public official who has simply ordered a nonresident by mail to comply with state law as a prerequisite to doing business in his State

has had. The case therefore provides no support for the proposition that Texas's exercise of personal jurisdiction over the Commissioner in the present case would have been proper, and it in fact helps to illustrate by comparison why such an exercise would have violated due-process principles.

Dairy Mart involved a suit that a convenience store chain filed in federal bankruptcy court in New York against Kentucky officials who were responsible for managing a fund created to assist underground petroleum storage tank owners and operators to meet their cleanup responsibilities under a federal act. 411 F.3d at 369. Since the case discusses only Eleventh Amendment and *Ex parte Young*, 209 U.S. 123 (1908), principles, it provides no support for the proposition that Texas's exercise of personal jurisdiction over the Commissioner in the present case would have comported with due-process principles.

Thus, none of the cases that Stroman cites establish that the Fifth Circuit erred in determining that the Commissioner lacked the minimum contacts with Texas necessary to subject her to suit there in accordance with such principles.

II. This Court Should Not Consider Which Due-Process Analysis Applies in Federal-Question Cases Once the Forum State's Long-Arm Statute's Criteria Are Met Because That Issue Was Neither Raised nor Considered Below.

This Court should not consider which due-process analysis applies in federal-question cases once the forum State's long-arm statute's criteria are met, *see* Pet. at 25-30, because Stroman did not raise that issue below and the Fifth Circuit did not consider it. *See* Appendix to this Brief in Opposition; Pet. App. 1a-22a. This Court normally does not consider issues that were neither raised nor considered below. *Travelers Cas. & Surety Co. of Am. v. Pac. Gas & Elec. Co.*, ___ U.S. ___, ___, 127 S. Ct. 1199, 1207 (2007). In *Fry v. Pliler*, ___ U.S. ___, ___, 127 S. Ct. 2321, 2327 (2007), the Court granted review to consider what standard governed a particular issue. The petitioner subsequently argued that the lower court had erred in its application of the standard that it did apply. *Id.* This Court refused to consider that argument. *Id.* at 2327-28. In the present case, Stroman argued that personal jurisdiction could properly be exercised over the Commissioner based on a Fourteenth Amendment due-process analysis. *See* Appendix to this Brief. It now argues for the first time in this Court that a different standard – a Fifth Amendment due-process analysis – should instead apply. Pet. at 25-30. This is essentially simply the reverse of the situation in *Fry*, and the Court should not consider the new issue in this case either.

III. This Court Should Not Consider Whether the Due Process Clause Applies in the First Instance in Actions Against Public Officials in Their Official Capacities Because That Issue Was Neither Raised nor Considered Below.

This Court should not consider whether the Due Process Clause applies in the first instance in actions against public officials in their official capacities, *see* Pet. at 30-34, because Stroman did not raise that issue below and the Fifth Circuit did not consider it. *See* Appendix to this Brief in Opposition; Pet. App. 1a-22a. The authorities cited and the rationale provided for refusing to consider the other issue that Stroman is raising for the first time in this Court, *see supra* at 33, apply here as well.

In addition, if Stroman had raised this issue below, the Commissioner would have argued that accepting Stroman's position on the issue would have constituted grounds to dismiss this action. The Eleventh Amendment guarantees that private individuals cannot sue unconsenting States in federal court. *Bd. of Trustees v. Garrett*, 531 U.S. 356, 363 (2001). This bar applies regardless of the relief sought. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). Thus, Arizona is entitled to Eleventh Amendment protection from Stroman's suit. Stroman cannot obtain the benefit of the *Ex parte Young* doctrine to avoid the Eleventh Amendment bar

yet discard the fiction to strip the Commissioner of her right to protection under the Due Process Clause.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STROMAN REALTY, INC., Plaintiff, v. ELAINE RICHARDSON, Defendant.	Civil Action No. H-05-1203 (Judge Kenneth M. Hoyt) (Filed Oct. 12, 2005)

STROMAN REALTY, INC.'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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* * *

Further, Arizona's administrative cease and desist order has no effect on Stroman's claims in this action to enjoin Arizona's unconstitutional extraterritorial enforcement efforts. Stroman has never conducted activities in Arizona that would give Arizona jurisdiction to regulate Stroman, and an order issued absent jurisdiction is void. In addition, claim preclusion does not apply to a judicially unreviewed administrative order, such as Arizona's. It certainly does not apply where, as here, the administrative process is inadequate to hear Stroman's § 1983 claims or to grant the permanent injunctive relief Stroman seeks in this case. Finally, even if applicable, the cease and desist order has no effect on Stroman's ability to seek prospective relief to enjoin Arizona's continued unconstitutional enforcement efforts.

ARGUMENT

I. This Court has Jurisdiction Over Defendant.

Arizona claims that this court does not have jurisdiction, asserting that Arizona does not have minimum contacts with Texas and has not directed sufficient activities relating to this lawsuit toward Texas to support jurisdiction under the due process

clause. Az. Mem. at 8-10. To the contrary, Arizona has reached into the State of Texas to impose Arizona law and regulations on Texas citizens based on activities Stroman conducts solely in Texas.

When the court does not conduct an evidentiary hearing on a defendant's motion to dismiss, the party seeking to assert jurisdiction "is required only to present sufficient facts to make out a prima facie case supporting jurisdiction." *Central Freight Lines, Inc. v. APA Transport Corp.*, 322 F.3d 376, 380 (5th Cir. 2003); *accord Guidry v. United States Tobacco Co., Inc.*, 188 F.3d 619, 625 (5th Cir. 1999). "The court shall accept as true that party's uncontroverted allegations . . . and resolve all factual conflicts in favor of the party seeing [sic] to invoke the court's jurisdiction." *Id.*

The general due process considerations under which a nonresident can be subject to personal jurisdiction is set forth in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174 (1985). A nonresident must engage in such activities that he is deemed to have fair warning that his activity may subject him to the jurisdiction of the foreign state. *Id.* at 472, 105 S.Ct. at 2182. This requirement is met if defendant has purposefully directed his activities at residents of the forum and the litigation relates to those activities. *Id.* Parties who reach out beyond their own state and create continuing relationships or obligations with residents of another state are subject to jurisdiction in the other state for the consequences of their activities. *Id.* at 473, 105 S.Ct. at 2182.

The due process clause is not a shield to use to avoid the consequences of interstate obligations voluntarily assumed by defendant. *Id.* at 473-74, 105 S.Ct. at 2183. Where defendant has deliberately engaged in activities within a state or created obligations between himself and residents of the forum, it is not unreasonable to require him to litigate in that forum. *Id.* at 475-76, 105 S.Ct. at 2184. A single act can support jurisdiction and physical presence is not required. *Id.* at 475 n.18, 476, 105 S.Ct. at 2184 n.18, 2184.[5]

The deprivation of constitutional rights is treated as a tort for the purposes of determining minimum contacts. *Ziegler v. Indian River County,* 64 F.3d 470, 473-74 (9th Cir. 1995) (jurisdiction for Section 1983 claim is analyzed under a tort standard); *c.f., Bagg v. Univ. of Texas Med. Branch*, 726 S.W.2d 582, 584 n.1 (Tex. App. 1987). A tortfeasor has minimum contacts

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[5] *Bullion v. Gillespie,* 895 F.2d 213, 216 (5th Cir. 1990) ("It is well settled that specific jurisdiction may arise without the nonresident defendant's ever stepping foot upon the forum state's soil or may arise incident to the commission of a single act directed at the forum."); *Brown v. Flowers Indus., Inc.*, 688 F.2d 328, 332-34 (5th Cir. 1982), *cert. denied,* 460 U.S. 1023, 1035 S.Ct. 1275 (1983) (holding that district court had jurisdiction over defamation defendant who initiated defamatory telephone call to Mississippi which caused injuries in Mississippi); *Bounty-Full Entertainment, Inc. v. Forever Blue Entertainment,* 923 F.Supp. 950, 955-56 (S.D. Tex. 1996) (sending letter into Southern District of Texas accusing television producers of violating trademark and copyright law was sufficient to warrant jurisdiction there for copyright/trademark infringement claim, libel claim and unfair competition claim).

with a state if he performs acts directed at the forum state which cause harm that the defendant should have anticipated would be suffered in the forum state. *Ziegler,* 64 F.3d at 474; *see Calder v. Jones,* 465 U.S. 783, 788-90, 104 S.Ct. 1482, 1486-87 (1984) (effect of defendant's Florida conduct in California made jurisdiction in California proper). It is well settled that the Texas long arm statue [sic] extends as far as federal due process requirements allow. *Central Freight Lines, Inc.*, 322 F.3d at 380.

Arizona's argument that its conduct was not aimed at Texas and its conduct in Texas was not sufficient for it to anticipate that it would be sued in Texas ignores the allegations of the complaint and the nature of Arizona's conduct. As described supra and in the Amended Complaint, Stroman is a Texas corporation, is licensed in Texas, has its only business office in Texas, all of its employees are in Texas and does all of its business by internet, telephone and mail from its Texas office. All contracts between Stroman and its customers are accepted by Stroman in Texas and all funds received in Texas. The choice of law provision in Stroman's contracts typically provide that they will be governed by Texas law. Am. Comp. ¶ 28. Thus, any activities that would be regulated by a real estate licensing authority are performed exclusively in the state of Texas.

In contrast, Arizona has reached beyond its borders to apply its laws and regulations to Stroman and its customers in Texas. Arizona has taken the position that Stroman and its salespersons are required to

obtain Arizona broker's and salesperson's licenses and comply with all of Arizona's laws and regulations if Stroman conducts activities with respect to timeshare resales that if the timeshare is located in Arizona, regardless of the residence of the potential buyer or seller or if it advertises Arizona timeshares on the internet. *Id.* ¶ 32. Arizona also purports to limit Stroman's communications with non-residents who have Arizona timeshare interests, (Ex. 11 to Am. Comp. at 4) and to regulate Stroman's contact with Arizona residents even when the timeshare is located elsewhere. *Id.* at 2-3.[6] Arizona's Department of Real Estate has contacted Stroman and sent correspondence to Stroman's counsel in Texas insisting that Stroman obtain an Arizona real estate license before conducting these activities. Ex. 10 to Am. Comp. Moreover, it has issued an administrative cease and desist order, which it served on Stroman in Texas and asserting that Arizona has the authority to impose such an order against Stroman for these activities and that it has the authority to haul Stroman into Arizona to defend itself against an administrative proceeding.

By its actions, Arizona has reached into Texas to impose its regulatory scheme on Stroman, not for business it does in Arizona, but for business it does in Texas. For example, every time a Texas resident calls

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[6] Arizona's cease and desist order alleges Stroman conducted activities with respect to timeshares located in Nevada, California and Colorado.

Stroman about an Arizona timeshare property, Stroman is under threat of penalties for actions taken in Texas. If Stroman enters into its standard registration/advertising agreement, which is a personal service contract,[7] with a Texas resident and the timeshare interval is in Arizona, Arizona claims Stroman is subject to penalties even though the owner is a Texas resident. If Stroman accepts payment for its registration/advertising services from a Texas resident, it must maintain copies of documents pertaining to the transaction in Arizona, and also must store copies of employment records for its Texas employees in Arizona. Am. Comp. ¶ 42. Stroman is subject to discipline even when the parties have agreed that their contract will be governed by Texas law. *See* Exhibit 11 to Am. Comp. at 3.

This court's decision in *Stroman Realty, Inc. v. Antt* is directly on point. In finding that the court had jurisdiction over the Florida and California licensing officials who had insisted Stroman's licensure was required in those states, the court observed that the defendants were:

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[7] *Coldwell Banker & Co., et al. v. Karlock*, 686 F.2d 596, 599 (7th Cir. 1982) ("[a] real estate brokerage contract is generally characterized as a contract for personal services rather than a contract conveying an interest in land"); *Selover, Bates & Co. v. Walsh*, 226 U.S. 112, 123, 33 S.Ct. 69, 72 (1912) (rejecting claim that Colorado law applied to contract for sale of land drafted in Minnesota because it involved Colorado property because the contract was "strictly personal" and "[i]t in no way affects the land or seeks any remedy against it.").

> seeking to regulate the business of a South-Texas land dealer and his numerous South-Texas customers. The individual officers are asserting a nationwide authority to regulate business, and they are applying their authority against a Texan in Texas. The statutes in question are neither consumer protection measures, nor land title regulations: they are – pure and simple – broker regulations. A federal court sitting in Houston is a reasonably logical place to litigate a federal constitutional question arising from the officers' attempt to impose their power on a Texan.

20 F. Supp.2d at 1053. The court noted that California had sent cease and desist letters to Stroman and that Florida had written to Stroman demanding that it disclose documents. "These activities in Texas are not fortuitous or attenuated; they are part of a deliberate effort to exert the officers' authority in Texas." *Id.*

As with Florida and California, Arizona has reached into Texas to impose its laws and regulations on Stroman and its customers. Arizona purports to control the full scope of Stroman's relationship with anyone that owns, buys, sells, or seeks to buy or sell a timeshare located in Arizona, as well as Stroman's communications with Arizonans who have timeshare interests outside the state. Arizona has attempted to force this Texas business to obey Arizona law in Texas by having Arizona regulatory officials send cease and desist letters to Stroman and Arizona should have anticipated that the harm caused by its acts directed

at Texas would have an effect on Texas residents. Jurisdictional minimum contacts have been established.[8]

Asserting jurisdiction over Arizona in this forum also comports with notions of fair play and substantial justice. Although Arizona claims that Stroman is subject to its jurisdiction in Arizona, where Stroman has no office or employees, Arizona asserts that it cannot be sued in Texas. As the court previously recognized:

> This is double-speak. On the one hand [defendants] argue they may regulate Stroman even though it is from a different state, and even though it has only tenuous connections with their states. On the other hand, they argue that this court does not have

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[8] Arizona's citation to *Hildebrand v. Steck Mfg. Co., Inc.*, 279 F.3d 1351 (Fed. Cir. 2002), is irrelevant. Az. Mem. at 11. In that case, the court applied Ohio's long-arm statute, which, unlike the Texas statute, "does *not* grant" the state's "courts jurisdiction to the limits of the fourteenth amendment." 279 F.3d at 1355 (emphasis added). Moreover, unlike the warning letters sent by the patent holder in *Hildebrand,* Arizona's contacts with Stroman are part of an effort to exert continuing regulatory control over Stroman's business in Texas. This same distinction likewise sets Stroman's case against Arizona from *Jarrett v. State of North Carolina,* 868 F.Supp. 155 (D.S.C. 1994). Az. Mem. at 11. There, a recent South Carolina resident, formerly of North Carolina, sued a North Carolina licensing board for releasing his file by mail to a third party in South Carolina. Unlike this single, isolated contact that completed the alleged tort, Arizona's demands that Stroman comply with Arizona law in Texas are an ongoing constitutional violation.

> jurisdiction over them because they are from different states, and because they have only tenuous connections with this state. They cannot have it both ways. They can't have their cake and eat it too. . . . These aphorisms about double standards and reciprocity are not often jurisprudential, but they articulate an aspect of fair play and substantial justice.

20 F. Supp.2d at 1054. Moreover, Arizona seeks to regulate transactions even where no party is an Arizona citizen. Again, in finding jurisdiction over California and Florida was appropriate, the court found it compelling that:

> [B]oth states seek to enforce their statutes in situations that involve only non-residents as long as the land is in the state. For example, Florida might try to regulate an Oklahoman's selling a Nebraskan a Miami timeshare through a Kansan as a broker, and California might try to regulate a South Dakotan's selling a Marylander a Napa Valley timeshare through a Wisconsin broker. . . . Under their view of the scope of their authority, they would also be able to regulate a Filipino's selling a Belgian an Orlando or San Francisco timeshare through a Pakistani broker.

Id. at 1054. Here, too, requiring Arizona to defend the constitutionality of its regulatory overreaching in the forum to which it directed these efforts comports with notions of fair play and substantial justice.

Jurisdiction is appropriate for other reasons as well. In determining whether finding jurisdiction is consistent with fair play and substantial justice, the court considers the "interstate judicial system's interest in obtaining the most efficient resolution of controversies." *Burger King,* 471 U.S. at 476-77, 105 S.Ct. at 2184-85. This case presents essentially a single legal issue, whether Arizona is prohibited by the Commerce Clause from applying its real estate licensing laws to Stroman's interstate business of timeshare resales. This is an important question because application of these local laws threatens the viability of the interstate resale market and the viability of Stroman's business. It is the same question Stroman raises in its litigation against Illinois, and which it raised previously in its case against Florida and California. Judicial efficiency is served if the answer to this question is decided in one jurisdiction to avoid the possibility of inconsistent results on basically the same facts. Stroman's burden also will be significantly less if it has to litigate only in one jurisdiction. Stroman's interest in obtaining convenient and effective relief will be served if this case proceeds in Texas. See *Burger King,* 471 U.S. at 476-77, 105 S.Ct. at 2184-85. Texas also has a significant interest in adjudicating the dispute. Texas residents are being deprived of the right to select their own real estate agent and rely on Texas law by the projection of Arizona law into Texas's sovereign territory. *Id.* Stroman's allegations establish that personal jurisdiction over Arizona is proper, and that jurisdiction is

fully consistent with the fairness considerations stated in *Burger King*.

II. Venue is Proper in the Southern District of Texas.

Venue is proper if "a substantial part of the events or omissions giving rise to the claim" occurred in this district. 28 U.S.C. § 1391(b)(2). If personal jurisdiction is proper, then venue is also proper under 28 U.S.C. § 1391(b)(2). *See* Commentary on 1988 and 1990 Revisions to § 1391, Subdivision B, Clause 3. When moving to dismiss for lack of proper venue, defendant has the burden of demonstrating that plaintiff could not bring suit in this judicial district. *Bounty-Full Ent., Inc.*, 923 F. Supp. at 957. When determining proper venue for a 42 U.S.C. § 1983 claim, venue may be equally correct in two judicial districts under Section 1391(b). *Andrade v. Chojnacki*, 934 F. Supp. 817, 827 n. 18 (S.D. Tex. 1996). However, a court is not obligated to determine the 'best' venue for a cause of action pending before it, but rather must determine only whether or not its venue is proper. *Setco Enter. Corp. v. Robbins*, 19 F.3d 1278, 1281 (8th Cir. 1994).

In *Andrade*, the estates of the members of the Branch Davidian cult brought federal civil rights claims against Texas, the Texas National Guard, a former Texas governor and federal

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No. 06-20095

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STROMAN REALTY, INC.,
Plaintiff-Appellant,

v.

ELAINE RICHARDSON,
Commissioner for the Department of Real Estate for the State of Arizona,
Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Texas, Houston Division
C.A. No. H-05-01203

BRIEF OF PLAINTIFF-APPELLANT, STROMAN REALTY, INC.

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April 18, 2006

ORAL ARGUMENT REQUESTED

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Thus, even under these cases, which involved court orders rather than unreviewed administrative

orders, parties were permitted to challenge ongoing enforcement efforts despite previous adverse findings. Stroman's suit against the Commissioner can be afforded no less latitude. Here, Stroman seeks prospective injunctive relief to preclude the Commissioner's continued unlawful assertion of regulatory authority over Stroman. This is *not* the same claim asserted by the Commissioner in its cease and desist order and that order cannot bar Stroman's commerce clause challenge to the Commissioner's authority. As in *Wooley,* Stroman seeks "to be free from prosecutions for future violations of the same statutes." 430 U.S. at 711. The lower court thus erred when it dismissed Stroman's claim for prospective injunctive relief.

IV. DISMISSAL CANNOT BE UPHELD ON THE ALTERNATE GROUNDS URGED BY THE COMMISSIONER COMMISSIONER BELOW

Although not relied upon by the district court when it dismissed Stroman's case, the Commissioner argued three additional bases for dismissal below: lack of personal jurisdiction; improper venue; and that the statute of limitations barred Stroman's claim because it was aware of the Commissioner's position as of January 2000. None of these arguments supports the lower court's ruling.

A. The District Court Had Jurisdiction over the Commissioner and Venue was Proper in the Southern District of Texas.

Personal jurisdiction over the Commissioner is appropriate here. The deprivation of constitutional rights is treated as a tort for the purposes of determining minimum contacts for personal jurisdiction. *See Simon v. United States,* 644 F.2d 490, 497 (5th Cir. 1981) (applying Louisiana's tort provision of long-arm statute to defendants in plaintiffs claims for constitutional rights violations); *Calder v. Jones,* 465 U.S. 783, 788-90 (1984) (stating that effect of defendant's Florida conduct in California made jurisdiction in California proper). "It is well settled that specific jurisdiction may arise without the nonresident defendant's ever stepping foot upon the forum state's soil or may arise incident to the commission of a single act directed at the forum." *Bullion v. Gillespie*, 895 F.2d 213, 216 (5th Cir. 1990).

Here, the Commissioner asserts that Arizona real estate licensing laws apply to Stroman's business activities, which are conducted solely in Texas, and that Stroman is subject to Arizona's statutory scheme even when the transaction involves non-Arizona residents. R 96, 161. In so doing, the Commissioner has reached into Texas to impose Arizona's regulatory scheme on Stroman, and has sent correspondence to Stroman in Texas as part of this illegal assertion of authority. R 156. The Commissioner even contends it has the power to regulate Stroman's relationships with Texas residents. The criteria for the exercise of jurisdiction over the Commissioner are met and

jurisdiction in Texas comports with notions of "fair play and substantial justice." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 476 (1985).

Venue in the Southern District was likewise appropriate. Venue is proper if "a substantial part of the events or omissions giving rise to the claim" occurred in this district. 28 U.S.C. § 1391(b)(2). If personal jurisdiction is proper, then venue is also proper under 28 U.S.C. § 1391(b)(2). *See* Commentary on 1988 and 1990 Revisions to § 1391, Subdivision B, Clause 3.[15]

B. The Statute of Limitations Does Not Bar Stroman's Case.

Nor does the statute of limitations argument bar Stroman's claim. *See* R 341-44. While federal courts look to applicable state court statutes of limitations to determine the time for bringing suits under 42 U.S.C. § 1983, "federal law determines when a civil rights action accrues, and, therefore, when the statute of limitations begins to run." *Perez v. Laredo Junior College,* 706 F.2d

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[15] Even if the lower court had found that the Commissioner met her burden on personal jurisdiction and venue grounds, a transfer of the action, not dismissal, would have been the appropriate course. *See Goldlawr, Inc. v. Heiman,* 369 U.S. 463, 466 (1962) (stating that the language of 28 U.S.C. § 1406(a) is "amply broad enough to authorize transfer of cases" whether or not the court has jurisdiction over the defendant.).

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REPLY BRIEF OF PLAINTIFF-APPELLANT, STROMAN REALTY, INC.

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scheme and place an unconstitutional burden on the interstate timeshare resale market.[7] As in *Wooley v.*

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[7] Applying res judicata to Stroman's commerce clause claims is particularly inappropriate given the nature of Stroman's business, wherein its primary method of marketing timeshares is through a proprietary, online database that makes information concerning individual intervals available to potential customers worldwide. R 92. The effect of the internet on both the interstate market and commerce clause jurisprudence is evolving. *See Am. Booksellers Found. v. Dean,* 342 F.3d 96, 104 (2d Cir. 2003) (observing that "it [is] likely that the internet will soon be seen as falling within the class of subjects that are

(Continued on following page)

Maynard, 430 U.S. 705 (1977), Stroman "seek[s] only to be free from prosecutions for future violations of the same statutes" and the order cannot preclude Stroman's claim for prospective relief. *Id.* at 711.

II. DISMISSAL CANNOT BE UPHELD ON THE ALTERNATE GROUNDS URGED BY THE COMMISSIONER

A. The Arizona Commissioner's Assertion of Authority Over Stroman's Texas Operation Subjects the Commissioner to Jurisdiction and Venue in the District Court

As an alternate ground for affirmance, the Commissioner argues that the lower court lacked personal jurisdiction and that venue in the United States District Court for the Southern District of Texas was improper. A.Br. 51-58. Neither ground is supported and the lower court correctly retained jurisdiction in this case.

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protected from State regulation because they 'imperatively demand[ ] a single uniform rule.'") (Alteration original) (citation omitted). Utilizing an unreviewed, summarily issued cease and desist order based on alleged conduct occurring in the 1990s to prevent Stroman from ever challenging the impact of Arizona's regulatory scheme on this changing market defies common sense.

1. The Commissioner Has Substantial Contacts with the Southern District

The sole ground for defendant's assertion that the lower court lacked personal jurisdiction both here and below was that the Commissioner's contacts were insufficient with the forum to justify the exercise of personal jurisdiction. A.Br. at 53, R 221-23. Thus, the Commissioner claims it is not subject to suit in Texas but:

- Arizona has authority over and can regulate a company based in Texas;
- the Texas company is subject to the laws of Arizona notwithstanding that the Texas company conducts all its business activities in Texas and has no office or employees in Arizona and provides no services in Arizona;
- the Commissioner can require compliance with orders that it sends into Texas; and
- she can regulate contracts executed in Texas among Texans as well as those between a Texan and residents of states other than Arizona.

In short, the Commissioner is free to regulate the Texas based business in Texas but is exempt from suit in Texas. This is not the law.[8]

As acknowledged by the Commissioner, the court's jurisdiction in this case is determined by the Texas long-arm statute which is co-extensive with the limits of the due process clause. A.Br. at 51. This Circuit uses a three part test to address the issue of personal jurisdiction. *Luv N' Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465 (5th Cir. 2006).

> "(1) whether the defendant . . . purposely directed its activities toward the forum state or purposely availed itself of the privileges of conducting activities there; (2) whether the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) whether the exercise of personal jurisdiction is fair and reasonable."

Id. at 469 *(quoting Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 474 (1985)). After the plaintiff establishes minimum contacts, "the burden of proof shifts to the defendant to show that the exercise of jurisdiction would be unreasonable." *Id.* at 473 (citation omitted). Where, as here, there was no evidentiary

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[8] Arizona does not dispute that the Commissioner is amenable to service of process under the state long arm statute. Fed. R. Civ. P. 4(e), 4(k)1(A); *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 105 (1987). Arizona committed its constitutional tort "in whole or in part in" Texas. Tex. Civ. Prac. & Rem. § 17.042(2).

hearing, plaintiff must only establish a prima facie case and all allegations set forth in the complaint must be taken as true. *Paz v. Brush Engineered Materials, Inc.*, 445 F.3d 809, 812 (5th Cir. 2006).[9]

The criteria set forth in *Luv N' Care* are met here. The Commissioner has engaged in regulatory acts in Texas by virtue of its assertion of a legal right to dictate the manner of operation of business activities in Texas involving Texans. The Commissioner "purposely directed [her] activities" at residents of the forum and the litigation relates directly to those activities. *Luv N' Care, Ltd.*, 438 F.3d at 469.

Contrary to the Commissioner's assertion, jurisdiction is not based only on the sending of an order into Texas that subjects the Commissioner to jurisdiction. A.Br. at 54. The Commissioner asserts that

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[9] Although not raised as an objection by Arizona, it is not necessary to sue a state official in the official's state of authority if the official commits a tort outside the state. *Nevada v. Hall*, 440 U.S. 410 (1979) (proper to sue Nevada in California court for tort committed in California rejecting Nevada's arguments that sovereignty and comity precluded it from being haled into California's court system). Furthermore, when one state attempts to regulate activity within the boundaries of another state, it is reasonable for the courts in the other state to exercise jurisdiction over the state which is regulating the activity. *St. Croix Waterway Ass'n v. Meyer*, 942 F. Supp. 435, 440-41 (D. Minn. 1996) (where Minnesota and Wisconsin jointly administered regulations pertaining to land and river within Minnesota, a Minnesota resident was able to compel the Wisconsin official to defend a constitutional attack on the regulations in Minnesota).

Stroman and its salespersons are required to obtain Arizona broker's and salesperson's licenses and comply with all of Arizona's laws and regulations if Stroman conducts activities with respect to timeshare resales that if the timeshare is located in Arizona, regardless of the residence of the potential buyer or seller or if it advertises Arizona timeshares on the internet. R 96, 156. Arizona also purports to limit Stroman's communications with non-residents who have Arizona timeshare interests, (R 161) and to regulate Stroman's contact with Arizona residents even when the timeshare is located elsewhere. R 159-60.[10] Arizona has contacted Stroman and sent a cease and desist order and correspondence to Stroman's counsel in Texas insisting that Stroman obtain an Arizona real estate license before conducting these activities occurring in Texas. R 156. The conduct Arizona is regulating is Stroman's conduct in Texas.

Importantly, Arizona asserts that it has control and authority over contracts *even when no Arizona resident is involved in the transaction*. *See* A.Br. at 53. It is not Stroman's acts that "transcend" Arizona's borders but the converse. *Id.* For example, Arizona claims Stroman is subject to penalties even though the owner is a Texas resident. If Stroman accepts payment for its registration/advertising services from a Texas resident, it must maintain copies of documents

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[10] Arizona's cease and desist order alleges Stroman conducted activities with respect to timeshares located in Nevada, California and Colorado.

pertaining to the transaction in Arizona, and also must store copies of employment records for its Texas employees in Arizona. R 98. Stroman is subject to discipline even when the parties have agreed that their contract will be governed by Texas law. *See* R 160. Contrary to the Commissioner's contention that she had no "reason to expect to litigate in Texas District Court" (A.Br. at 55), she had fair warning that her activity may subject her to the jurisdiction of Texas. *See Burger King,* 471 U.S. at 472.

The Commissioner simply cannot claim she has the right to regulate Stroman in Texas and simultaneously exempt herself from the reach of the Texas federal courts. *Stroman Realty, Inc. v. Antt,* 20 F. Supp. 2d. 1050, 1053 (S.D. Tex. 1998) ("A federal court sitting in Houston is a reasonably logical place to litigate a federal constitutional question arising from the officers' attempt to impose their power on a Texan.") As in *Antt,* Arizona has similarly reached into Texas to impose its laws and regulations on Stroman and its customers. R 96, 156, 158-63. "These activities in Texas are not fortuitous or attenuated; they are part of a deliberate effort to exert the officers' authority in Texas" and jurisdiction is appropriate in the district court. *Id.*

The cases on which the Commissioner relies do not support the contention that she is exempt from the jurisdiction of the lower court. *Hildebrand v. Steck Mfg. Co., Inc.,* 279 F.3d 1351 (Fed. Cir. 2002) (A.Br. at 54-55) is completely inapposite. In that case, the court applied Ohio's long-arm statute, which,

unlike the Texas statute, "does *not* grant" the state's "courts jurisdiction to the limits of the due process clause of the fourteenth amendment." 279 F.3d at 1355 (emphasis added). Moreover, unlike the warning letters sent by the patent holder in *Hildebrand,* which had at best a "tenuous" "causal link" to the cause of action in that case, *id.,* the Commissioner's exertion of continuing regulatory control over Stroman's business in Texas has a direct "causal link" to Stroman's complaint.

This same distinction likewise sets Stroman's case apart from *Jarrett v. State of North Carolina,* 868 F. Supp. 155 (D.S.C. 1994). A.Br. at 54-55. There, a recent South Carolina resident, formerly of North Carolina, sued a North Carolina licensing board for releasing his file by mail to a third party in South Carolina. Unlike this single, isolated contact that completed the alleged tort, the Commissioner demands that Stroman and its agents obtain Arizona real estate licenses to deal with any Arizona residents regardless of whether the individual is a client of Stroman (R 96, 161), that Stroman and its agents possess Arizona licenses even when dealing with residents of other states if that discussion involves an Arizona based timeshare (R 96, 156, 159), that Stroman and its agents maintain current licensing by attending continuing education courses, pay fees, and submit filings to the real estate commissioner in Arizona (R 96-99, 161), *inter alia,* all the while Stroman and its agents are conducting business pursuant

to their personal service contracts in Texas. R 87, 92-96.

Thus, the Commissioner's argument that this case "arises out of and relates to activities conducted in Arizona" is factually and legally unsupported. A.Br. at 53. It is precisely because Arizona has reached into Texas and imposed its laws on Stroman that Stroman has a claim against the Commissioner based on her extraterritorial enforcement of Arizona law.

Finally, Texas has a significant interest in adjudicating the dispute. Texas residents are being deprived of the rights to select their own real estate agent and rely on Texas law. *See Burger King,* 471 U.S. at 476-77. Under these circumstances, jurisdiction in Texas is entirely appropriate.

2. Venue is Proper in the Southern District

The Commissioner's argument that venue is proper only in Arizona must be rejected. As the Commissioner recognized, venue in this case is dictated by 28 U.S.C. § 1391(b)(2) where a "substantial part of the events or omissions giving rise to the claim occurred". Here, that jurisdiction is the Southern District of Texas because, as set forth above, that is where the acts "underlying the

* * *